Supreme Court, U. S.
FILED
SEP 16 1980
MICHAEL RODAK, JR., CLERK

No. 80-464

In the

Supreme Court of the United States

OCTOBER TERM, 1980

DORIS M. DICKISON, KENNETH B. DICKISON, DONALD L. SCHIELEIN, LOUISE TOBIN, GLENDEN G. HANNAH and FEUCHTER ENTERPRISES,

Petitioners,

vs.

BROCK ADAMS, Individually and as Secretary of Transporation for the United States, Washington, D.C., DONALD E. TRULL, Regional 5 Administrator of the Federal Highway Administration, JAY W. MILLER, Division Engineer of the Federal Highway Administration, JAMES THOMPSON, Governor of the State of Illinois, JOHN CRAMER, Individually and as Secretary of the Department of Transportation of the State of Illinois, RONALD BURRIS, Comptroller of the State of Illinois, JERRY CONSTANTINO, Treasurer of the State of Illinois, CHARLES ROBERT BURRIS, District Engineer of District No. 2, Illinois Department of Transportation, JACK E. HARLAND, District Engineer of District No. 4, Illinois Department of Transportation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER BY THE ENTRY OF SUMMARY JUDGMENT FOR THE RESPONDENTS THE DISTRICT COURT IGNORED MATERIAL ISSUES OF FACT AND FORECLOSED ITS ABILITY TO ENGAGE IN A SUBSTANTIAL INQUIRY WITH RESPECT TO THE RESPONDENTS' ALLEGED LACK OF COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT.

II. WHETHER BY THE ENTRY OF SUMMARY JUDGMENT FOR THE RESPONDENTS THE DISTRICT COURT IGNORED MATERIAL ISSUES OF FACT AND FORECLOSED ITS ABILITY TO ENGAGE IN A SUBSTANTIAL INQUIRY WITH RESPECT TO THE PETITIONERS' CONTENTION THAT THE SELECTION OF THE PROPOSED ROUTE FOR FEDERAL HIGHWAY PROJECT 405 WAS ARBITRARY AND CAPRICIOUS.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on June 19, 1980.

QUESTIONS PRESENTED

I. Whether By The Entry Of Summary Judgment For The Respondents The District Court Ignored Material Issues Of Fact And Foreclosed Its Ability To Engage In A Substantial Inquiry With Respect To The Respondents' Alleged Lack Of Compliance With The National Environmental Policy Act.

II. Whether By The Entry Of Summary Judgment For The Respondents The District Court Ignored Material Issues Of Fact And Foreclosed Its Ability To Engage In A Substantial Inquiry With Respect To The Petitioners' Contention That The Selection Of The Proposed Route For Federal Highway Project 405 Was Arbitrary And Capricious.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Central District of Illinois which are not reported in official or unofficial reports appear in the appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit is dated and was entered on June 19, 1980. The jurisdiction of this Court is involved under 28 USC Section 1254.

STATUTES INVOLVED

42 USC Sec. 4332(2)(c) ..... Appendix
(cited at p. 3)

5 USC Sec. 706(2) ..... Appendix
(cited at p. 3)

RULES INVOLVED

USCS Rules of Civil Procedure, Rule 56 ..... Appendix
(cited at p. 9)

23 C.F.R. Part 771-5(a), Federal Highway Administration Policy and Procedure Memorandum 90-1, Sec. 6 (1976) ..... Appendix

STATEMENT OF THE CASE

The Petitioners are Illinois farmers and landowners upon whose property a portion of the federally funded highway project known as FAP 405 is to be constructed. Since this proposed highway will be built in part with federal funds it qualifies as a "major Federal (action) significantly affecting the quality of the human environment", 42 USC Sec. 4332 (2)(c), for which an Environmental Impact Statement ("EIS" hereafter) is required. The Petitioners brought suit in the Federal District Court for the Southern District of Illinois seeking to permanently enjoin the construction of the highway. They have alleged, *inter alia,* that the final EIS was inadequate under the National Environmental Policy Act ("NEPA" hereafter), 42 USC Sec. 4321, *et. seq.,* and that the selection of the highway route was arbitrary and capricious. This action arises under the provisions of 42 Sections 1983 and 1988, 42 USC Sections 4321 through 4335, 23 USC Section 109 and the Fifth and Fourteenth Amend-

ments to the United States Constitution. Petitioners invoked the District Court's jurisdiction under the provisions of 28 USC Sections 1331, 1342 and 1361, and 5 USC Sections 701 through 706.

At all of the public hearings held in connection with the highway project and in all public notices with respect thereto, it was represented to the public that the state and federal governments intended to construct approximately 40 miles of highway in order to connect the junction of Routes 474 and 74 west of Peoria to FAI Route 180 west of Hennepin, Illinois. At issue herein is the most southerly 12 mile long segment of FAP 405 which is currently slated for construction over Petitioners' property extending from the junction of FAI Routes 474 and 74, north and east around Peoria to immediately north of an east-west Peoria County highway designated No. 25, also known as Cedar Hills Drive. A final design EIS was prepared for this 12 mile segment only.

The Petitioners contended in their complaint that the final design EIS should have been prepared for the entire 40 mile length of the proposed highway and not just for the 12 mile segment currently slated for construction. They further complained that the route selection was arbitrary and capricious because it was the result of political pressure rather than an adequate evaluation of its effect upon farmland and wildlife especially as compared with alternate routes which would have affected significantly less farmland and wildlife.

Both sets of state and federal Respondents moved for summary judgment. In support of their motion, the Respondents argued that the 12 mile segment was appropriate for final EIS purposes, under the judicially determined tests of segmentation, in that the highway: (1)

had utility independent of the remainder of the project, (2) did not preclude evaluation of alternate routes for the remainder of the highway and (3) the plan had not become concrete enough to make it highly probable the entire plan would be carried out in the near future.

The Respondents attempted to support these arguments by, *inter alia,* submitting affidavits, prepared for use in connection with this litigation, suggesting that although a design study has been authorized for the portion of FAP 405 north of the southern segment currently slated for construction the northern 28 mile portion of FAP 405 may never be built, could be built in any direction, and could even be built entirely outside of the 10 mile wide corridor EIS which has already been prepared for the northern 28 mile segment. (Appendix at page 15a.) In addition, the Respondents submitted sworn traffic studies, prepared for use in connection with this litigation, to support their suggestion that the northern terminus of the 12 mile segment was logical. (Appendix at page 7a.)

The Petitioners responded, *inter alia,* averring that inasmuch as the project had been intended to connect the junction of Routes 474 and 74 west of Peoria and FAI Route 180 west of Hennepin, nothing less than that distance was appropriate for a final EIS. The Petitioners supported their allegations concerning the true scope of the federal projects by submitting affidavits describing, *inter alia,* their attendance at all of the relevant public hearings wherein the Respondents consistently represented FAP 405 to be a 39.8 mile project and not a local 12 mile project and the Respondents' communications to the Petitioners at the corridor public hearings that there was a need for the construction of the full 39.8 miles. Additionally, they argued, *inter alia,* that material ques-

tions of fact were presented as to whether the northern terminus of the 12 mile segment qualified as a "logical terminus" for EIS purposes and whether the route chosen was arbitrary and capricious.

After taking briefs and holding a brief hearing at which the Petitioners were given approximately five minutes within which to argue and no opportunity to initiate any discovery or present any testimony as to the merits of the controversy, the District Court ruled that the affidavits of the Petitioners "do not appear to raise any genuine issues of material fact for trial", (Appendix at page 8a.); and, accordingly, summary judgment was entered for the Respondents. Petitioners prosecuted an appeal to the United States Court of Appeals for the Seventh Circuit.

The court of Appeals for the Seventh Circuit affirmed finding as a matter of law to-wit:

(1) The district Court made no error finding that the segment before it connected logical termini, meeting the first *Swain* (*Swain* v. *Brinegar,* 542 F. 2d 364 (7th Cir. 1976)) test of independent utility apart from the entire proposed FAP 405. (Appendix at page 15a.)

(2) Affidavits indicate that at present no state funds are available for completion of the remainder of FAP 405 and the need for that completion is being reevaluated, although a design study has been authorized for the portion of FAP 405 north of the southern segment. (Appendix at page 15a.)

(3) Plaintiffs have failed to show any facts, nor does the record reveal such facts, which would indicate that the choice of route for the 12 mile segment was arbitrary and capricious. (Appendix at page 16a.)

REASONS FOR GRANTING WRIT

I. WHETHER BY THE ENTRY OF SUMMARY JUDGMENT FOR THE RESPONDENTS THE DISTRICT COURT IGNORED MATERIAL ISSUES OF FACT AND FORECLOSED ITS ABILITY TO ENGAGE IN A SUBSTANTIAL INQUIRY WITH RESPECT TO THE RESPONDENTS' ALLEGED LACK OF COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT.

The refusal of the Court below to reverse the District Court's determination as to the true scope of the federal project for EIS purposes is in direct conflict with the general rule held by all federal jurisdictions which have considered the question that where the major objective of a proposed highway is to connect two cities by expressway, then these two termini should determine the proper scope of the final EIS. *Indian Lookout Alliance* v. *Volpe,* 484 F. 2d 11 (8th Cir. 1973); *Committee to Stop Route 7* v. *Volpe,* 346 F. Supp. 731 (D. Conn. 1972).

The decision of the lower Court is also in conflict with the general rule held by all federal jurisdictions that when reason allows, the EIS should be more extensive than the project which is currently slated for construction and that the concepts of "independent utility" or "logical termini" are not litmus paper tests that foreclose further inquiry as to the appropriate scope of an EIS. *Indian Lookout Alliance* v. *Volpe,* 484 F. 2d 11 (8th Cir. 1973); *Appalachian Mountain Club* v. *Brinegar,* 394 F. Supp. 105 (D. N. H. 1975); *Patterson* v. *Exon,* 415 F. Supp. 1276 (D. Neb. 1976); *Committee to Stop Route 7* v. *Volpe,* 346 F. Supp. 731 (D. Conn. 1972).

In other words, the scope of the EIS should be at least as broad as the scope of the federal action being taken. *Swain* v. *Brinegar,* 542 F. 2d 364 (7th Cir. 1976); *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 422 U. S. 289, 322, 95 S. Ct. 2336, 45 L. Ed. 2d 191 (1974). It is not disputed that the scope of the federal action known as FAP 405 has always been presented to the public at all public hearings and in all public notices with respect thereto as a 40 mile project designed to provide a direct high volume highway service between Peoria and Chicago. (Appendix at pp. 8a., 15a.) However, after the commencement of the instant litigation the Respondents prepared and submitted litigation affidavits indicating *for the first time* that the scope of the federal project was being reevaluated and that the highway might ultimately encompass only 12 instead of 40 miles. (Appendix at pp. 8a., 15a.) (Emphasis added) In addition, after the commencement of the litigation the Respondents prepared and submitted sworn traffic studies which suggested, *inter alia,* the volume of traffic which would be generated at the northern terminus of the 12 mile segment. (Appendix at pp. 7a., 14a.-15a.)

The heavy reliance of the Court below upon the litigation affidavits which never received the distribution and circulation that NEPA requires is in conflict with the holdings of this Court. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971); *Camp* v. *Pitts,* 411 U. S. 138, 36 L. Ed. 2d 106, 93 S. Ct. 1241 (1973); *FPC* v. *Transcontinental Gas Pipeline Corp.,* 423 U. S. 236, 46 L. Ed. 2d 533, 96 S. Ct. 579 (1976). For example, in *Camp* it was held that if the decision is not supportable on the administrative

record made, then the decision must be vacated and the matter remanded for further consideration. *Id.*, 36 L. Ed. 2d at 111. In other words, the "focal point for judicial review should be in the administrative record already in existence, not in some new record made initially in the reviewing Court". *Id.*, 36 L. Ed. 2d at 111.

Moreover, it should be noted that the heavy reliance of the Court below upon the sworn traffic studies is in direct conflict with the holding in *Appalachian Mountain Club* v. *Brinegar*, 394 F. Supp. 105 (D. N. H. 1975) wherein the Court stated: "It is beyond this Court's competence to assess the adequacy of traffic data and the conclusions drawn therefrom". *Id.*, 394 F. Supp. at 115 (D. N. H. 1975).

It should also be emphasized that the Court below affirmed the entry of summary judgment. It is respectfully submitted that at a bare minimum genuine issues of material fact have been presented as to the true scope of the federal action in question for EIS purposes. *See* USCS Rules of Civil Procedure, Rule 56 and the citations thereunder.

Finally, due to the fact that the appropriate scope of an EIS for federal highway construction has not been settled by this Court, a definitive statement by this Court is needed to insure that NEPA does not become a paper tiger.

II. WHETHER BY THE ENTRY OF SUMMARY JUDGMENT FOR THE RESPONDENTS THE DISTRICT COURT IGNORED MATERIAL ISSUES OF FACT AND FORECLOSED ITS ABILITY TO ENGAGE IN A SUBSTANTIAL INQUIRY WITH RESPECT TO THE PETITIONERS' CONTENTION THAT THE SELECTION OF THE PROPOSED ROUTE FOR FEDERAL HIGHWAY PROJECT 405 WAS ARBITRARY AND CAPRICIOUS.

At the public hearing held on November 8, 1972, two alignments (within the corridor) known as Alternate 1 and Alternate 2 were presented to the public as having been selected for final study. Alternate 1 was then selected as the chosen alignment subsequent to the November 8, 1972 hearing (Design EIS at p. 111).

The Petitioners would have offered proof that the selection of Alternate 1 was arrived at by political pressures and in fact was not even the alternate which was recommended by the Illinois Department of Transportation (Plaintiffs' Brief in Opposition to Motion to Dismiss pages 12 and 13).

The selection of Alternate 1 will cost 4.9 million dollars more to construct than Alternate 2. Alternate 1 will destroy 143 more acres of prime farmland than Alternate 2. Alternate 1 will destroy 22 more acres of virgin woodland than Alternate 2. Alternate 1 will displace nearly twice the number of people and businesses as Alternate 2 (Final Design EIS p. 109).

More specifically, Petitioners would have offered evidence indicating that the main objective behind the political pressure which culminated in the selection of Alternate 1 was a plan by the City of Peoria to annex Cater-

pillar's industrial plant at Mossville, Illinois to the City of Peoria, Ilinois with the use of federa tax dollars by the means of strip annexation. There presently exists an intergovernmental agreement between the City of Peoria and the Illinois Department of Transportation wherein the City of Peoria has hired the transportation department to acquire certain land immediately west of the right-of-way in order to accomplish this strip annexation of Caterpillar.

In assessing such a claim, the Courts must first consider "whether the Secretary acted within the scope of his authority" and second whether the ultimate decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 415 (1971). Certainly Plaintiffs' claim, if true, establishes an abuse of discretion. It would seem to be equally clear that such a claim should not be resolved upon the cold and summary assertions of the pleadings.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 79-1012

DORIS M. DICKISON, KENNETH G. DICKISON, DONALD L. SCHIELEIN, LOUISE TOBIN, GLENDEN G. HANNAH and FEUCHTER ENTERPRISES,

Plaintiffs,

vs.

BROCK ADAMS, individually and as Secretary of Transportation for the United States, Washington, D.C.; DONALD E. TRULL, Regional 5 Administrator of the Federal Highway Administration; JAY W. MILLER, Division Engineer of the Federal Highway Administration; JAMES THOMPSON, Governor of the State of Illinois; JOHN KRAMER, individually and as Secretary of the Department of Transportation of the State of Illinois; ROLAND BURRIS, Comptroller of the State of Illinois; JERRY COSENTINO, Treasurer of the State of Illinois; R. H. BLASIUS, District Engineer of District No. 3, Illinois Department of Transportation; JACK E. HARLAND, District Engineer of District No. 4, Illinois Department of Transportation; W. E. BURNS, District Engineer of District No. 6, Illinois Department of Transportation,

Defendants.

DECISION AND ORDERS ON MOTIONS FOR SUMMARY JUDGMENT

(Filed June 29, 1979)

Plaintiffs, by their complaint, seek to enjoin acquisition of further right-of-way for, and construction of, Freeway FAP 405, or disbursement of funds in connection therewith, as well as a declaration that actions thus

far taken by defendants thereon are violative of the National Environmental Policy Act of 1969 (hereinafter NEPA), 42 U.S.C. §4321ff. The federal and state defendants have moved for summary judgment in two separate motions which are here considered, after hearing and briefs submitted by the parties.[1]

The following facts are clearly established in the record before the court. Freeway FAP 405 is the designation recognized by Illinois and federal highway authorities as referring to a completely new highway which, if and when completed, will extend for 39.8 miles from the junction of FAI Routes 474 and 74 west of Peoria, northerly to FAI Route 180 west of Hennepin, Illinois. A segment of that proposed highway is here presently involved. It is the most southerly section which extends about 12 miles from said junction of FAI Routes 474 and 74, north and east around Peoria to immediately north of an east-west Peoria County highway designated No. 25, also known as Cedar Hills Drive. That portion of FAP 405 will be a northern area by-pass, serving local and regional traffic within the Greater Peoria area. It is expected to serve substantially greater volumes of traffic than the remaining portion of FAP 405 to the north, i.e., approximately 23,000 vehicles per day against 13,000 vehicles per day in the year 1990 on maximum traffic segments. For that reason it has been assigned a higher construction priority than the more northerly 27.8 mile balance of the project.

Under attack is the present decision, currently being implemented, to commence the highway improvement at

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[1] Defendants Blasius and Burns have been dismissed because they are Illinois district highway engineers of districts not involved in the present project, and Charles Robert Burris, District Engineer of District Number 2 has been substituted in his official capacity, with the same representation here as the other state defendants, by the Illinois Attorney General, because a small portion of District 2 is involved.

the southern terminus of FAP 405 with a 12-mile segment. That decision is believed justified by the highway authorities because the southern terminus is located at the western junction of the area's two interstate routes, FAI 474 and 74;[2] and the northern end of said 12-mile priority segment intersects Cedar Hills Drive in the Mossville area, which is near two major industrial complexes (being the Mossville plants of Caterpillar Tractor Company and Pioneer Industrial Park), and which are unquestionably major automobile traffic generators. In addition, Cedar Hills Drive (County Highway 25) provides a practical outlet for northbound traffic back to existing Illinois Route 29 (the present connection of the Peoria area with FAI Route 180) until the remaining northerly portion of FAP 405 to FAI 180 is completed. Less traffic congestion and greater traveling safety is expected to result from realization of this 12-mile segment of fully controlled access freeway. The whole Supplemental Freeway FAP 405, if and when completed, will provide a modern, direct, regional connection between Peoria and Chicago, previously non-existent.

Two final environmental impact statements were prepared which embraced this proposed 12-mile highway improvement. A draft impact statement was prepared in 1971 for the 39.8 mile corridor from FAI Routes 474 and 74 to FAI Route 180 west of Hennepin. A final impact statement (EIS) thereon was adopted by the Federal Highway Administration (FHWA) on June 12, 1972. In this corridor EIS, three separate corridors were studied. Public hearings were held in conjunction with the draft

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[2] FAI 74 is an interstate facility traversing directly through the Peoria urbanized area. FAI 474 is the area's east-west interstate by-pass route traversing the southerly portions of the Greater Peoria area. Supplemental Freeway FAP 405, commencing at the junction of these two major interstate routes, was designed to provide a continuation of interstate quality, high-volume highway service to the north, and to be a part of an eventual Chicago-Kansas City highway.

corrridor statement and 585 people attended. The second final impact statement was prepared for the location alignment and design of the 12-mile segment here involved, beginning at the junction of FAI Routes 474 and 74 and ending shortly north of County Highway 25. The 12-mile segment is entirely within the selected one of the three corridors carefully considered in the final corridor statement adopted on June 12, 1972.

The draft design EIS on the 12-mile segment was prepared in 1973, and the final statement thereon was adopted by FHWA on August 3, 1976. Public hearings were held in connection with the draft EIS for the 12-mile segment as well, and again over 500 people attended the hearing. The final statement incorporated the views of the public expressed at the public hearings. A full discussion of alternative alignments is set forth in the final design EIS, and the decision on the selected alignment for the 12-mile segment was made from the analysis contained in the two impact statements, for the corridor and location alignment, respectively.

It is clear that the environmental consequences of the entire 39.8 mile Supplemental Freeway 405 were fully evaluated before the decision to build was made on the proposed 12-mile segment. The administrative record of actions taken by the state and federal defendants for Federal Aid Project 405, including copies of the Final Environmental Impact Statements for the 39.8 mile corridor and the 12-mile segment, are before the court.

Since the date of final approval of the final design EIS on August 3, 1976, approximately $7.5 million has been expended by the defendants on the proposed highway improvement. Two miles of right-of-way have been acquired and construction has begun. Design and planning consultant contracts have been awarded for the remaining ten miles. Additional right-of-way is scheduled to be acquired within the next few months. Additional construction contracts will be advertised for bid. The

total project cost for the 12-mile segment is estimated to be $52,000,000.

Both parties rely heavily upon the law as expounded in the case of *Swain* v. *Brinegar,* which arose in this court.[3] In that case this court entered judgment for the highway authority defendants and against plaintiffs who sought to prevent the building of a single segment of new highway on environmental grounds. *Swain* v. *Brinegar,* 378 F.Supp. 753 (1974). The majority of a three-judge panel of the United States Court of Appeals for the Seventh Circuit held that there had been an improper delegation of authority by FHWA to the Illinois Department of Transportation (IDOT) with respect to preparation of the EIS, required by 42 U.S.C. §4332(2)(c), and remanded the case to the district court to retain jurisdiction pending submission of a proper EIS by FHWA. *Swain* v. *Brinegar,* 517 F.2d 766 (7th Cir. 1975). Thereafter, Congress amended NEPA essentially to validate the procedure which had been followed by FHWA and IDOT; and upon subsequent consideration by the Court of Appeals *en banc,* by a 4 to 3 vote, it was observed that the panel decision could not stand, but that since there was no EIS which embraced the entire highway for its full length as projected, the statute was not satisfied with respect to the segment, by environmental statements limited to the segment involved. *Swain* v. *Brinegar,* 542 F.2d 364 (7th Cir. 1976). It is recognized, of course, that any principles of law enunciated in the latter opinion which are applicable here, are controlling here. However, the two earlier published opinions in that case can be of little, if any, help, and furnish only background information.

The Court of Appeals *en banc in Swain* (542 F.2d 367 ff.) observed and held as follows: (All citations omitted.)

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[3] Plaintiffs here assert that the Swain case "parallels" the present matter, and in many respects that is true.

"Our study of the present EIS, consisting of forty-six pages of textual material and numerous maps, charts and pictures, persuades us of the statutory adequacy of the EIS if this 15-mile segment of FAP 406 were to be considered alone. The EIS gives the requisite 'hard look' at the proposed action."

* * *

"We believe that that this section of the EIS fully complied with NEPA's mandate.

* * *

"However, we cannot agree that it was proper to confine the EIS to this 15-mile segment. Based on the standards articulated in NEPA, the regulation and the cases, it is clear that under the facts of this case, the proposed federal action being taken includes funding the entire 42 miles of FAP 406. Therefore, the judgment of the district court must be reversed."

* * *

"The purpose of NEPA is to require that federal decision-makers consider the environmental consequences of their actions before deciding to proceed. Their source of information, the EIS, must therefore be a pragmatic and realistic view of the scope of the action being contemplated. The view must be one neither confined to the literal limits of the specific proposal nor one unbounded except by the limits of the designer's imagination. The task of the court is not to decide where to draw the line, but to review the matter to ascertain whether the agency has made a reasonable choice."

* * *

"Taken together, the factors used by the courts and PPM 90-1 suggest that the scope of the proposed project can be determined by applying the following three standards:

"1. Does the proposed segment have a substantial utility independent of future expansion?

"2. Would its construction foreclose significant alternative routes or locations for an extension from the segment?

"3. If, as here, the proposed segment is part of a larger plan, has that plan become concrete enough to make it highly probable that the entire plan will be carried out in the near future?"

In *Swain,* for that case, the *en banc* court answered those questions: 1.-No. 2.-Yes. 3.-Yes. Here the initial EIS for the corridor did cover the entire length of the total project, and the answers to those questions are shown factually by uncontroverted affidavits before the court to be: 1.-Yes. 2.-No. 3.-No. Upon the basis of the standards specified in *Swain,* the defendants' motions for summary judgment must be allowed.

Plaintiffs argue that the corridor EIS, drafted first in 1970 and approved in final form in 1972, is inadequate as a design EIS. It is true, as observed by plaintiffs, that this corridor EIS was never intended to satisfy the requirements of NEPA for a meaningful design EIS. As a practical matter, a design could hardly be conceived until a decision to build on a particular route is taken, and only the present segment of FAP 405 has yet been designed. That is the reason PPM 20-8 requires two stages. The corridor EIS, however, does consider and specify design standards to protect the environment, and the design EIS later provides the detail for the segment involved. If it were necessary to have a design EIS for the total length of the final highway as totally conceived, before proceeding on any segment, questions 2 and 3 from the *Swain* case standards would be meaningless, and no segment of a total concept would be built and utilized until the whole concept was completely finalized. The *Swain* case opinion expressly rejects this extreme.

Plaintiffs also argue that the 1972 corridor EIS is "woefully outdated" by the intervention of inflated costs and the national 55 m.p.h. speed limit, but the significance

of these factors is not explained. It would seem that the fact that the taxpayer receives less highway for his dollar now than he once did, and can't drive as fast as some did in the past, in no way depreciates the environmental observations and conclusions of the corridor EIS here. Certainly it doesn't tend to indicate that the segment involved is less needed for use.

Plaintiffs also observe that the present appearance of less need for construction (in relation to cost) of the northerly 27.8 miles of FAP 405 shows an error in the corridor EIS; that at one time a design EIS for this northerly 27.8 miles was contemplated by state authorities; and that the fact that the northerly 27.8 miles could be built in the future, if built at all, outside of the previously selected corridor, somehow destroys the value of the corridor EIS here. The intended logic is not apparent. If and when the northern segment is built in the future, it is obvious that then existing law must be satisfied; but the fact that there may be many changes of many kinds in the interim does not destroy the reasonableness of the present program or render it violative of present law.

Plaintiffs also contend that the *Swain* case tests for unlawful segmentation are not met; but little is advanced in support of that conclusion. It is argued that whether major industrial complexes are traffic generators or not is a material question of fact precluding summary judgment; but there is no factual contest of the existence of such industrial complexes as stated by defendants' affidavits. It is hard to conceive a more precise description of an automobile traffic generator in today's world than an industrial plant; but neither do plaintiffs contest the sworn traffic volume studies comparing the southern and northern segments here. It is equally clear that if and when the northerly segment of FAP 405 is built, it will connect directly both to the southern segment and to I-180 at the north, but whether it traverses a shorter or longer route in between, either within or without corri-

dor B of the corridor EIS, is in no sense otherwise fixed. Neither the fact that a new EIS might then be needed, if the latter is determined to be otherwise in the public interest, nor the fact that the beginning and end must obviously connect up the highway as a whole, certainly does not mean that "significant alternative routes" in between are foreclosed.

With respect to the third question from the *Swain* case test, plaintiffs simply assert that FAP 405 has always been presented to embrace the same single concept of connecting the two points mentioned above with a 39.8 mile-high quality highway in response to a conceived need therefor, and as part of a larger interstate system. This does not even suggest that it can't be changed in response to possible changed circumstances, or that a shorter segment shouldn't be built to fulfill primarily a local part of the overall need if the statutory plan of environmental considerations is met. That may offend plaintiffs' collective view of right and justice; but it has nothing to do with whether "it is highly probable that the entire plan will be carried out in the near future." Perhaps because of skyrocketing costs, perhaps because of changed trends in the northern sector, it is clear, from sworn statements before the court, that, as a matter of fact, construction of the northern segment at any time is now highly problematical. This fact, quite obviously, destroys neither the need for the southern segment nor the two EIS's which support it. This fact does show that the answer here to the third question in the *Swain* case test is "No."

Aside from immaterial and conclusory statements, plaintiffs' affidavits show their interest, their early and continued opposition to FAP 405, the loss of farmland and wildlife refuge to highway use, if it is built, and the fact that they always were led to believe that the 12-mile segment was part of the 39.8 mile total highway, rather than a local project. It is obviously both. These assertions do not appear to raise any genuine issues of material fact for trial.

Defendants also argue that plaintiffs have been guilty of laches in filing this suit, having been aware of all developments from the beginning. On this point plaintiffs argue that there is "a vital public environmental interest against the application of laches." Since the court has decided the motions for summary judgment for defendants on the merits, the possible application of laches is moot and need not be decided or further discussed.

Plaintiffs make a number of other possibly true allegations of factual adverse effects of the taking of property for this highway, which, if considered alone and in a vacuum, would indicate that it might not be a public improvement. However, it appears that they were considered and evaluated against the benefits and were found outweighed. Meaningful environmental studies were made prior to any decision to move ahead. Each EIS here speaks for itself and cannot be depreciated by either unsworn or conclusory assertions by persons who simply disagree. Defendants here have important public responsibilities. To the extent that plaintiffs' lands are taken, they must be compensated under the law, and that issue is not involved here. The federal defendants also argue several other propositions which it is not believed necessary to discuss.

Accordingly, IT IS ORDERED that defendants' motions for summary judgment are ALLOWED and judgment will enter in favor of defendants and against plaintiffs, at plaintiffs' cost.

/s/ Robert D. Morgan
Robert D. Morgan
United States District Judge

Entered: June 29, 1979

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
(Argued January 21, 1980)

June 19, 1980

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

DORIS M. DICKISON, KENNETH B. DICKISON, DONALD L. SCHIELEIN, LOUISE TOBIN, GLENDEN G. HANNAH and FEUCHTER ENTERPRISES,

Plaintiffs-Appellees,

No. 79-2015 vs.

BROCK ADAMS, Individually and as Secretary of Transportation for the United States, Washington, D.C., DONALD E. TRULL, Regional 5 Administrator of the Federal Highway Administration, JAY W. MILLER, Division Engineer of the Federal Highway Administration, JAMES THOMPSON, Governor of the State of Illinois, JOHN CRAMER, Individually and as Secretary of the Department of Transportation of the State of Illinois, RONALD BURRIS, Comptroller of the State of Illinois, JERRY CONSTANTINO, Treasurer of the State of Illinois, CHARLES ROBERT BURRIS, District Engineer of District No. 2 Illinois Department of Transportation, JACK E. HARLAND, District Engineer of District No. 4, Illinois Department of Transportation,

Defendants-Appellants.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
No. 79-C-1012
ROBERT D. MORGAN, *Judge.*

ORDER

This case involves the construction of a limited access highway over land owned by plaintiffs, who allege that defendant highway officials[1] have taken actions in violation of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-61 and seek to permanently enjoin the construction of the highway. The district court granted defendants' motions for summary judgment. We affirm.

The proposed highway involved in this action is a twelve mile long segment of Freeway FAP 405 in central Illinois. Were it ever completed, FAP 405 would extend for 39.8 miles from the junction of FAI Routes 474 and 74 west of Peoria, northerly to FAI Route 180 west of Hennepin, Illinois. Involved in this action is the most southerly section of FAP 405, extending from the junction of FAI Routes 474 and 74, north and east around Peoria to immediately north of an east-west Peoria County highway designated No. 25, also known as Cedar Hills Drive.

Plaintiffs claim that the final environmental impact statement (EIS)[2] required by law was inadequate in this

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[1]Named as defendants are officials of the United States Department of Transportation and the Federal Highway Administration as well as fiscal and transportation officials of the state of Illinois.

[2] The environmental impact statement serves as a basis by which the agency can fully and completely evaluate the environmental consequences of the project. The environmental impact statement aspires to guarantee that the most intelligent, optimally beneficial environmental decision will ultimately be made. It also provides an accessible means by which those outside the agency can critically evaluate the agency decisions.
Florida Wildlife Federation v. *Goldschmidt,* 611 F.2d 547, 549 (5th Cir. 1980).

case because it was concerned only with the 12 mile segment rather than with the entire route of FAP 405 of about 40 miles and that the choice of the route at issue was arbitrary and capricious because it involves the removal from cultivation of more farmland than alternative routes.

This highway segment will be built in part with federal funds and thus qualifies as a "major Federal [action] significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), for which an EIS is required. Two draft and two final environmental impact statements have been prepared regarding this highway project. In 1971 a draft impact statement was prepared for the 39.8 mile corridor[3] through which the road would go. After publication of the draft corridor EIS, public hearings were held and a final corridor EIS was

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[2] (Continued)

The agency involved in the project is required to prepare a report on

(i) the environmental impact of the proposed action.

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

(iii) alternative to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

41 U.S.C. § 4332(2)(C)

[3] A corridor is the location through which a road will travel. It extends well beyond the actual boundaries of the proposed road. In this case, the alternative corridors considered were about forty miles in length but varied from one to five miles in width. Answer, Exhibit V at 8. Three alternative corridors were considered for this road.

issued in 1972. A draft design EIS[4] for the 12 mile segment was prepared in 1973. Following public hearings, a final design EIS was issued in 1976.

The final corridor EIS recognized that the selected corridor "would displace few families, although some farm units would be taken." Final corridor EIS at 10. It further noted, at 16, that:

> The commitment of agricultural lands to highway purposes is controversial in terms of environmental effect. Since farm commodity surpluses and the amount of acreage in land banks is increasing, it would seem that the small per cent needed for highway construction is warranted. This trend is expected to continue unless some unforeseen circumstances causes farm surpluses to vanish. In this case, it could be possible to utilize right-of-way for crop production or the freeway could be eradicated and turned back to farm lands.

All parties agree that the route chosen would require 790 acres including 575 acres of crop land; an alternative route considered would use 603 and 430 acres, respectively. The final design EIS chose the proposed route over the alternative and over the option of constructing no new road, giving reasons for the choice. Final design EIS at 111-13.

The final design of EIS reiterated the possibility of farming the right of way and of removing the road in the event of severe food shortages, provided statistical tables of the amount of cropland and the kinds of crops which would be lost by building of the road along two alternative routes, and predicted that building of the road would accelerate commercial, industrial, and residential development along the route. *Id.* at 128-34.

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[4] A design EIS is intended to assure adequate consideration of environmental factors and of public comment regarding the specific location and major design features of the proposed highway.

The adequacy of a final EIS prepared by a federal agency is subject to limited judicial review, to "determine whether it passes muster under the scope of review provisions of the Administrative Procedure Act, 5 U.S.C. § 706." *Farmland Preservation Ass'n* v. *Goldschmidt,* 611 F.2d 233, 237 (8th Cir. 1979). *See Matsumoto* v. *Brinegar,* 568 F.2d 1289, 1291 (9th Cir. 1978); *Coalition for Responsible Regional Development* v. *Coleman,* 555 F.2d 398, 399 (4th Cir. 1977). 5 U.S.C. § 706 provides, in relevant part, that "[t]he reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." "[I]t is not the function of the federal court ultimately to pass on the merits of the contemplated action or to substitute its judgment for that of the agency." *Farmland Preservation Ass'n* v. *Goldschmidt,* 611 F.2d 233, 237 (8th Cir. 1979). *See City of Des Plaines* v. *Metropolitan Sanitary Dis.,* 552 F.2d 736 (7th Cir. 1977).

Appellants' first contention is that the final design EIS was inadequate because it was addressed to only the 12 mile segment rather than to the total 40-mile length of FAP 405. The length of an appropriate segment of a highway to be included in an EIS has been discussed in Federal Highway Administration (FHWA) Policy and Procedure Memorandum (PPM) 90-1, § 6 (1976)[5] as follows:

> The highway section included in an environmental statement should be as long as practicable to permit consideration of environmental matters on a broad scope. Piecemealing proposed highway improvements in separate environmental statements should be avoided. If possible, the highway section should be a substantial length that would normally be included in a multiyear highway improvement program.

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[5] 23 C.F.R. Part 771.5(a) (1979).

Highway section is defined in PPM 90-1, §3(a) (1976) as "[a] substantial length of highway between logical termini (major crossroads, population centers, major traffic generators, or similar major highway control elements) as normally included in a single location study."

This court considered the appropriateness of a proposed highway segment in *Swain* v. *Brinegar*, 541 F.2d 364 (7th Cir. 1976) (en banc). Plaintiffs in *Swain* sought to enjoin construction of a 15 mile segment of a proposed federally-assisted highway of 42 miles between Peoria and Lincoln, Illinois. The road was divided into three segments of which the middle 3½ mile segment had already been constructed. The segment at issue would have gone from the southern end of the middle segment to the southern end of the entire highway. The court found that the EIS was sufficient as an evaluation of the 15 mile segment but that it was improper to confine the EIS to that segment because the segment alone did not constitute the "proposed action," 42 U.S.C. § 4332(2)(C)(i), for which the EIS had to be prepared. After reviewing the decisions of other courts and the provisions of PPM 90-1, this court set out three standards to be used to determine whether or not a highway segment constituted "proposed action" under the statute:

1. Does the proposed segment have a substantial utility independent of future expansion?
2. Would its construction foreclose significant alternative routes or locations for an extension from the segment?
3. If, as here, the proposed segment is part of a larger plan, has that plan become concrete enough to make it highly probable that the entire plan will be carried out in the near future?

Id. at 369.

The *Swain* court found that the northern terminus of the proposed segment at the southern end of the previously constructed segment had no independent utility

other than as part of the larger road because the "northern terminus ends in the country at no logical or major terminus" and was "near no major crossroad, population center or traffic generator . . . as specified in Section 3(a) of PPM 90-1." *Id.* at 370. Building this segment to connect with the middle segment was held to foreclose alternative routes or extensions from the southern segment. *Id.* Because of draft EIS had already been prepared for the northern segment of the road and the government conceded that it had sought or would seek funding for all segments of the road, the court concluded that the southern segment was part of a concrete plan which would probably be carried out in the near future. *Id.*

Plaintiffs here claim that the first test of *Swain* is not met because the segment lacks independent utility. Arguing that the northern end of the segment at issue was not a logical terminus, plaintiffs assert that this was a disputed material issue of fact and thus that the district court erred in granting summary judgment to the defendants. It is uncontested that the southern terminus of the 12 mile segment is a logical one, located as it is at the junction of two major interstate roads. The southern segment is expected to serve 23,000 vehicles per day in 1990.[6] As a northern by-pass of Peoria, it will benefit both local and through traffic. The northern terminus of the segment is located near a Caterpillar Tractor Company plant and Pioneer Industrial Park, which would generate an estimated 14,000 car trips per day by 1985 on this segment. In addition, County Highway 25 "affords an opportunity to reroute northbound traffic back to existing Illinois Route 29 . . ." Final design EIS at 4-6. The district court found no material issue of fact regarding the existence of major traffic generators at the northern terminus of the

[6] In contrast, the northern 28 miles of the total road are expected to serve only 13,000 vehicles daily. This disparity in use is indicated as a reason for giving a greater priority to the southern segment for construction. Final design EIS at 4.

segment: "It is hard to conceive a more precise description of an automobile traffic generator in today's world than an industrial plant; but neither do plaintiffs contest the sworn traffic volume studies . . . *Dickison* v. *Adams*, No. 79-1012, slip op. at 7 (C.D. Ill., June 29, 1979). Cases in which a road was found to terminate at a place other than a major traffic generator involve segments ending at county lines. *Indian Lookout Alliance* v. *Volpe*, 484 F.2d 11 (8th Cir. 1973); in the middle of woods, *Patterson* v. *Exon*, 415 F.Supp. 1276 (D. Neb. 1976); or at very small towns, *Daly* v. *Volpe*, 514 F.2d 1106 (9th Cir. 1975). However, the situation before us is dissimilar. We find as a matter of law that the district court made no error in finding that the segment before it connected logical termini, meeting the first *Swain* test of independent utility apart from the entire proposed FAP 405.

Affidavits before the court indicate that there has been no clear or irreversible commitment by federal or state officials to build the remainder of FAP 405 along any particular route or at all, although it is clear that the segment before us has long been presented to the public as part of a larger road. Were the road to be completed, nothing would foreclose its being built along a variety of routes from the northern terminus of the 12 mile segment to I-180 at Hennepin, Illinois. Further extensions of this segment might go through the previously approved corridor or through another corridor or simply connect with Illinois 29, the existing route from Peoria to I-180. That a future continuation of this road might go outside the previously approved corridor presumably would require a new corridor EIS to be prepared, but that fact does not affect the validity of the corridor or design EIS involved in the present road segment. Affidavits indicate that at present no state funds are available for completion of the remainder of FAP 405 and the need for that completion is being reevaluated, although a design study has been authorized for the portion of FAP 405 north of the southern segment. We find no error in the conclusion of

the district court that the second and third tests of *Swain* should be answered in the negative.

Because we have found that the district court was correct in ruling that the design EIS was properly limited to the 12 mile segment of FAP 405, we must now consider plaintiff's challenge to the adequacy of that EIS. Plaintiffs appear to assume that the existence of an alternative plan for the segment which would take a smaller amount of farmland shows conclusively that the design EIS was arbitrary and capricious because that alternative was not chosen. Such an assumption is unwarranted. The amount of farmland to be used by the segment and its alternative were discussed in the design EIS and the impact of the loss of productive farmland was discussed in general terms in the corridor EIS.[7] The two final environmental impact statements met NEPA's purposes of allowing the highway agencies to fully evaluate the environmental consequences of the project. The amount of farmland to be used by the segment was only one of many criteria used in deciding which specific route should be approved for this segment. After considering all of these criteria, the design EIS recommended the segment before us as serving more traffic, not taking park lands involved in the alternative route, and providing better access to commercial and industrial development, Final design EIS at 111-13. In balancing the benefits and detriments involved in building this segment, the EIS concluded:

> The proposed highway improvement will be on an entirely new location resulting in increases in the ambient noise levels and air pollution concentrations, a non-reversible commitment of natural and human resources, the diversion of approximately 790 acres of land to highway-orientated use, the displacement of families, the potential for ground water pollution and the alteration of area topography. These are the most

[7] See p. 3 *supra*.

> pronounced adverse effects which must be weighed against the need for long-term area economic development and a safe and efficient means of transportation. Although the proposed highway improvement will transport traffic through areas previously void of such means; it will also divert traffic from the existing local road system. The proposed improvement will not require the use of Section 4(f) lands nor involve any existing or potential historical landmarks of local, State or National significance.

Final design EIS at 1.

The law is clear that although environmental matters must be considered by an agency before proceeding with a project subject to NEPA, "Congress has nowhere determined that . . . interstate highway traffic moving goals . . . should be set aside whenever a highway would have some detrimental effect on the environment." *Daly* v. *Volpe,* 514 F.2d 1106, 1110 (9th Cir. 1975). Both final environmental impact statements here considered the taking of farmland as having a detrimental effect. We find that there was adequate consideration of this effect of the segment. Plaintiffs have failed to show any facts, nor does the record reveal such facts, which would indicate that the choice of route for the 12 mile segment was arbitrary and capricious.

Accordingly, the judgment appealed from is AFFIRMED.

42 USC Sec. 4332(2)(c) provides:

The Congress authorizes and directs that, to the fullest extent possible: (2) all agencies of the Federal Government shall—

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and view of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by Section 552 of Title 5, United States Code (5 USCS Sec. 552), and shall accompany the proposal through the existing agency review processes.

5 USC Sec. 706(2) provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title (5 USCS Sec. 556 and 557) or otherwise reviewed on the record of an agency hearing provided by statute, or

(F) unwarranted by the facts to the extent that the facts are subject to rial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

USCS Rules of Civil Procedure, Rule 56 provides in pertinent part:

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(C) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may

be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

23 C.F.R. Part 771.5(a) (1979), Federal Highway Administration 90-1, Sec. 6 (1976) provides in pertinent part:

> The highway section included in an environmental statement should be as long as practicable to permit consideration of environmental matters on a broad scope. Piecemealing proposed highway improvements in separate environmental statements should be avoided. If possible, the highway section should be a substantial length that would normally be included in a multiyear highway improvement program.